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COMPARATIVE LEGAL STUDIES

VOLUME 1

1981-1982



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Comparative Legal Studies

Questions for Class Discussion

These questions are based on Volumes 1 and 2 of reading materials issued to students, but in preparing the questions students need not limit themselves to reading the materials.

Section 1

Codification and the Napoleonic Code

1. What differences in legal policy came into being at the French Revolution, and what were the broad objectives of the Napoleonic Code?
2. What do you consider to be desirable and effective safeguards against arbitrary administration of the law? Compare the approaches of French law and the Common Law. What is the function of the Court of Cassation in the French system? Ought we to have something similar in Canada?
3. Discuss the interpretation of the Civil Code by the French courts as compared with the interpretation of statutes in our system.
4. What influence do you think judges ought to have in "making the law"? Compare our own system with the role of the French courts in applying their Civil Code.
5. What primary sources of law do you think are most desirable as building blocks for a legal system? Compare French law and the Common Law. Do we really need doctrines such as stare decisis in the Common Law?
6. Discuss this statement by a Danish lawyer: The perpetual genesis of the law is best accomplished as a result of co-operation between judges and scholars. The judge has the advantage of having heard a concrete case before he must give his opinion. The scholar has the advantage when he is studying a particular problem of being undisturbed by the irrelevant special equities of any one particular case.
Consider in relation to "jurisprudence" and "doctrine" in French law, in comparison with our own system.
7. Ehrensweig states: Until 1961 there had been published 22,058 volumes of court reports: until 1953 over 2 million decisions. The computer is the inevitable perfection of this monstrous development....
Do you think that the Common Law systems can survive indefinitely?

Would a Civil Code on the French pattern be preferable?

8. How important is it that laws should be promulgated in a form that lay people can understand (at least in principle)? Consider the language and drafting objectives of the Napoleonic Code in this connection. Is it desirable that courses on legal systems and legal institutions should be made more widely available outside Law Schools?
9. Discuss the influence of Roman law on English Common Law and the legal systems of Western Europe.
10. Do you think that the "export" or imitation of codified law should be promoted further, and, if so, how? Consider the various "exports" of the Napoleonic Code. Various English statutory codes have been adapted in Canada. The Ontario Personal Property Security Act is modelled on the American Uniform Commercial Code.

Section 2

Contracts, Family Law, Property

11. Discuss the concept of a "unilateral" contract. Consider, for example, an option. Should this concept be imported into our law? Consider Pillans v. Van Mierop, 3 Burr 1663, 97 E.R. 1035.
12. What functional role do you think "cause" and "consideration" play in their respective legal systems? Would it be a desirable rule that a "twin-born naked pact" should be actionable? What would be the objection, if any?
13. Do you think that the Common Law rule of privity of contract is a useful rule? Consider French Civil Code, article 1121; McEvoy v. Belfast Banking Co. [1935] A.C. 24; and the Scottish case of Dickson v. National Bank 1917, S.C. (H.L.) 50.
14. Do you think that married couples should be given a choice of matrimonial property regime? If so how should the choice be exercised?
15. What do you think are the advantages and disadvantages of "deferred community" or "sharing of surplus" (e.g. Scandinavian countries; West Germany; Quebec; Ontario Law Reform Commission, Report on Family Law, Part 4: see Baxter, "Family Law Reform in Ontario", 25 U. of T.L.J., pp. 250-271).
16. Do you think there is a case for having a special code and special tribunals for family law matters?

17. "The first point of interest to note is the comparative insignificance in Roman law of the distinction between land and other property:" Roman Law and Common Law, Buckland and McNair (2nd ed., Lawson) p. 60.
- Would it be a good idea to have a unified law of property, making no distinction between kinds of property except in so far as the physical form made this necessary (e.g. movables, immovables, intangibles)?
18. What functional purpose do concepts such as "fee simple", "equitable interest", "doctrine of estates" have in a modern system of property law? If other legal systems can manage without them, do we need to retain them?
19. The "trust" in the Common Law systems has no exact equivalent in the Civil Law systems? Are the latter missing anything by not having the trust? If so, what?
20. The B.G.B. (Bürgerliches Gesetzbuch), art. 812(1) provides that a person who, through an act performed by another person or in any other manner acquires something at the expense of the latter without legal justification is bound to return it to him.
- Should we have a general principle of restitution like this in our law? Consider e.g. Goff and Jones, The Law of Restitution, chap. 1; Sinclair v. Brougham [1914] A.C. 398; Murdoch 13 R.F.L. 185, 207-209.

Section 3

Courts and Lawyers

21. How do the roles of legislator and judge complement each other in French law?
22. It has been said that the American lawyer "thinks it more than a coincidence that liberty has best thrived in the part of the world where procedure has been litigious and contentious rather than officious and inquisitorial": see Ehrenzweig, Psychoanalytic Jurisprudence, p. 260. Consider this statement and explain the main distinctions in principle between civil procedure in the Common Law and the Civil Law countries.
23. Discuss the ideal background, training, and experience for being a judge. Consider, for example, "career" judges; judges who are not lawyers; specialised courts such as: administrative, tribunals; revenue courts; labour courts; commercial courts; family courts; juvenile courts.

24. Do you think a state should allow foreign lawyers to practise within the state, and of so to what extent and subject to what conditions? Consider this also in relation to a common market structure, such as the EEC.
25. "Despite the jury's decline and limited impact on party autonomy and rules of evidence, it seems that it is still the jury that determines the Anglo-American judge's image and functions as those of a mere moderator of the contest. Indeed, so firmly has this image been established that even the fusion of law and equity, the current vast preponderance of non-jury cases, as well as codification of state and federal rules aimed at enhancing the judge's powers, have left his seemingly powerful figure (and with him the parties) at the mercy of professional combatants:" Ehrenzweig, Psychoanalytic Jurisprudence, p. 265. Discuss this statement in the context of Civil Law systems.
26. "Many lawyers maintain that the "fight" theory and the "truth" theory coincide. They think that the best way for a court to discover the facts in a suit is to have each side strive as hard as it can, in a keenly partisan spirit, to bring to the court's attention the evidence favorable to that side": Jerome Frank, Courts on Trial, p. 80. Discuss this statement.
27. In contrast to continental European law, the Common Law has developed a number of rules excluding evidence that could be logically relevant, e.g. the hearsay rule, treatment of confessions. Can you suggest some reasons for the distinction? Do you think that the Common Law rules of admissibility should apply irrespective of the type of proceeding? Consider, for example, an issue as to the custody of a child, or a question of child protection under The Child Welfare Act, Part 2.
28. Compare the training and organization of the legal profession in Canada and in another country.
29. There are a number of specialized courts in West Germany, e.g. administrative courts (Verwaltungsgerichte); revenue courts (Finanzgerichte); social insurance courts (Sozialgerichte); labour courts (Arbeitsgerichte); constitutional courts (Verfassungsgerichte); federal patent courts (Bundespatentgerichte).
- Should we have more specialised courts in Canada? What do you think would be the advantages and disadvantages?

30. What do you think would be the advantages or disadvantages of a "divided Bar" and sub-classes of lawyers e.g. barristers, solicitors, advocates, notaries, procurators, etc.

Section 4

Commercial Transactions, Corporations.

31. Would it be a good idea to introduce a special system of commercial law and tribunals on the French style into Canada? What do you think would be the advantages and disadvantages? Is it a good idea to have lay judges or assessors in commercial cases?
32. Explain the distinction between "customary law" and a "usage of trade". Consider Rayner v. Hambros [1943] K.B. 37; Watteau v. Fenwick [1893] 1 Q.B. 346; Hogarth v. Leith Cotton-Seed Oil, 1909, S.C. 955 (Scottish case).
33. What are the implications of res perit domino in relation to insurance of goods? Consider this in relation to (a) a French sale, (b) a West German sale, (c) an international c.i.f. sale.
34. What are the differences between Anglo-Canadian and West German law on the undisclosed principal? Compare the theories of the undisclosed principal and contracts for the benefit of a third party. Consider Smith v. River Douglas [1949] 2 K.B. 500, 514-5; Cohn, Manual of German Law, Vol. 1, ss. 165, 205, 216.
- But West German law permits contracts in favour of a third party (Vertrag zugunsten Dritter, B.G.B., art. 328).
- Are the positions of Anglo-Canadian and West German law both illogical?
35. Is the commercial letter of confirmation in West German law a good idea? Consider Brogden v. Metropolitan Railway 2 App. Cas. 666.
- Should it be an absolute rule that silence does not imply consent? Consider the question of a letter of acceptance lost in the post. Compare Byrne v. Van Tienhoven 5 C.P.D. 344; Mason v. Benhar Coal 9 R. 883 (Scottish case). In West German law mere dispatch of a letter of acceptance is not sufficient (B.G.B., art. 130).
- Are the positions of both Anglo-Canadian and West German law both inconsistent with respect to whether silence implies consent?
36. X company is incorporated in Utopia where it has its main administration. Utopia has recently passed a law nationalizing certain private property

(including the shares and assets of X company). X company has assets in West Germany. X company has now been dissolved in Utopia.

According to a decision of the West German Supreme Court (Vol. 33, p. 195), X company would be considered to have a continued existence in West Germany as a "split" corporation (Spaltgenossenschaft).

French and Belgian court have employed the concept of a "factual" corporation (société de fait). See Baxter, Essays on Private Law, pp. 185-186.

Compare the Canadian Bankruptcy Act in regard to foreign corporations.

Discuss the problems of the dissolution of a corporation in state A which has assets and/or shareholders in state B.

37. A French société anonyme wants to grant security for a loan or debentures.

What forms of security do you think would be available under French law?

How do they manage in West Germany without the Common Law-style real estate mortgage? What are the alternatives?

Consider whether you think it would be feasible to extend the concept of "security interest" in Ontario Law (Personal Property Security Act, s. 1(y); Catzman etc., Personal Property Security Law, (pp. 30-31) to cover all forms of security i.e. security over immovables and corporeal and incorporeal movables?

Compare the "hypothec" and the "charge" (floating or fixed).

38. What do you think would be some of the problems of "harmonization" of laws on matters such as corporations or tax in countries of a common market e.g. the E.E.C.? Consider Sanders, The European Company, 6 Georgia Journal of Int. and Comp. Law, 367-394.

39. Bearer securities are common in Europe. What problems or differences in law and practice do you think this would produce as compared with North America?

Is it feasible to reduce the settlement of securities transactions to "book" transfers? Consider Baxter and Johnston, New Mechanics for Securities Transactions, 21 U. of T.L.J., 336-377.

40. What are the disadvantages of a payments system based on cheques drawn on a multiplicity of banks? What do you think are the purposes of G.I.R.O. payment systems in the U.K. and Western Europe? Consider Baxter, The Simple Payment of Money, 24 U. of T.L.J., 63-95.

41. "It has often been suggested that modern techniques for the collection and communication of credit information have made filing systems unnecessary and obsolete:" Gilmore, Security Interests in Personal Property, Vol. 1, p. 463.

"The system of filing provided in Article 9 of the Uniform Commercial Code is the point of greatest practical difference between the Code and German law. As I have indicated previously, formal means of making security interests public are completely lacking in Germany."

Ulrich Drobrig, Max-Planck Institute for Foreign and International Private Law, Hamburg, West Germany, in Aspects of Comparative Commercial Law, ed. Ziegel and Foster, at p. 372.

Consider these quotations in relation to Ontario law on personal property secured transactions i.e. The Personal Property Security Act, Part 4; Catzman, etc., Personal Property Security Law, pp. 168-171. What do you consider to be the objectives and advantages of a public registration system for secured transactions?

42. Discuss the difference in historical development of the "law merchant" in France as compared with the Common Law.

Comparative Legal Studies

The following questions are intended to be used by students for self-testing on their reading of Volume 1 of the materials.

French law. Read Materials Vol. 1, pp. 1-52 and consider the following:

1. What differences in legal policy came into being at the Revolution?
What were the broad objectives of the Napoleonic Code? (pp. 1-2).
2. What was the importance of the writing of Pothier? (p. 4).
3. Napoléon's view that the Code was his greatest achievement (p. 5).
4. Why was simplicity of language an objective of the Napoleonic Code?
(pp. 8, 14, 29).
5. What was the function of the Cour de Cassation in protecting the integrity of the Code? (p. 9). (see also pp. 97-98).
6. What protects against arbitrary administration of the law (a) in French law; (b) in the Common Law? (p. 12) (see also pp. 37-38).
7. The relation between the primary law of the Code and the secondary, interpretative, law of the courts. (pp. 16-18).
8. What were the views of Portalis as to the role of the legislator?
(pp. 19-20, 32).
9. The status of court decisions in France. (pp. 34-35). (see also pp. 98-100).
10. Explain: "jurisprudence"; "doctrine"; "jurisprudence constante".
(pp. 36-37).
11. The Napoleonic Code and other countries. (pp. 43-49) (see also p. 95).

French law. Read Materials Vol. 1, pp. 53-92 and consider the following:

12. Formation of contract in French law and in a Common Law system. (54-55).
13. Development of the Law Merchant. (p. 58).
14. Influence of the classical Roman law on the French law of contracts.
(pp. 60-61).
15. What was the attitude of the Napoleonic Code to divorce? (p. 72).
16. Explain "divorce sanction"; "divorce-faillite"; "injures graves".
(pp. 73-74).
17. What was the legal matrimonial regime adopted by the Napoleonic Code?
(pp. 74-75).

18. What are "biens réservés"? (p. 78).
19. What was the succession position of a widow under the Napoleonic Code? (p. 80).
20. What is the meaning of "propriété"? (pp. 85-86).
21. How does the Napoleonic Code classify property, and how is property transferred? (pp. 89-92).

French law. Read Materials Vol. 1, pp. 93-137 and consider the following:

22. What did the Napoleonic Code do for the reputation of French law? (pp. 94-95).
23. Outline the organisation of the French courts. (pp. 97-98).
24. Why is there no separate "equity" in French law"? (pp. 102-103).
25. The special terms mentioned on pp. 104-105.
26. The French legal profession. (pp. 106-107).
27. Distinguish: "pays de coutumes"; "pays de droit écrit"; "coutume de Paris". (pp. 109-111).
28. What topics are included in French commercial law? (p. 114).
29. Discuss "acte de commerce" and "commerçant". (pp. 114-116).
30. What is the meaning of "fonds de commerce"? (p. 116).
31. What are the types of French commercial company? (pp. 118, 137).
32. Discuss "société anonyme". (pp. 120-123).
33. What is the French system of post office banking? (pp. 131-132).

West German law. Read Materials Vol. 1, pp. 138-172 and consider the following:

34. Which European systems have been influenced by German law? (pp. 138 and 153).
35. Distinguish "Gesetz" and "Gewohnheitsrecht"? (pp. 138-139).
36. Outline the organization of the W. German courts. (pp. 139-141 and 159-165).
37. How was Germany divided after 8 May 1945? (pp. 143-144).
38. Explain "Allied Control Commission", "Allied Kommandatura" (pp. 144-145).
39. Explain "Bundestag" and "Volkskammer". (pp. 146-147).
40. Discuss the reception of Roman law into Germany (pp. 150-151).
41. Discuss the W. German legal profession. (pp. 165-168).

West German law. Read Materials Vol. 1, pp. 173-206, and consider the following:

42. What topics are covered by the B.G.B., and is the B.G.B. written in simple language? (pp. 173-174).
43. What is the effect in W. German law of the foreign expropriation of a company? (p. 176 ex. 4).
44. When does the "Handelsgesetz" apply? (p. 179).
45. What is a "merchant" in the H.G.B.? (p. 180).
46. What is a commercial act? (p. 181).
47. What is the "Handelsregister"? (pp. 181-183).
48. How does W. German law deal with the "undisclosed principal"? (p. 184).
49. What is a "Prokura"? (pp. 184-185).
50. What is the difference between a "Prokurist" and a "Handelsvertreter"? (pp. 185-192).
51. What is a "Handelsmäkler"? (pp. 192-193).
52. What is a commercial letter of confirmation (Kaufmännisches Bestätigungsschreiben)? (pp. 193-194 and Brogden v. Metropolitan Rlwy. (1877) 2 App. Cas. 666).
53. Does silence ever mean consent in W. German commercial law? (p. 194).
54. What is the effect of agreement without delivery in W. German law? (p. 198).
55. What is "Wertpapier"? (pp. 200-201).